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May 5, 1999

CC Docket No. 99-154

HAND DELIVERED

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Petition of Global NAPs, Inc. for Preemption of the Jurisdiction of the New Jersey Board of Public Utilities Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996

Dear Secretary Salas:

Enclosed please find an original and four (4) copies of the the above-referenced petition.

Should there be any questions, please contact the undersigned counsel.

Sincerely,

Christopher W. Savage

cc: Attached Service List

92357.1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of Global NAPs, Inc. for Preemption of the Jurisdiction of the New Jersey Board of Public Utilities Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996

CC Docket No. 99-154

PETITION OF GLOBAL NAPS, INC.

1. Global NAPs, Inc. ("Global NAPs") files this Petition in accordance with the requirements of 47 C.F.R. § 51.803(a), and in accordance with that rule respectfully requests that the Commission preempt the jurisdiction of the New Jersey Board of Public Utilities ("the Board") with respect to an arbitration proceeding involving Global NAPs and Bell Atlantic-New Jersey ("Bell Atlantic").

2. Global NAPs originally requested interconnection with Bell Atlantic in New Jersey in March 1998. Initial attempts to negotiate an individualized interconnection agreement proved fruitless, in August 1998, Global NAPs concluded that its best hope of obtaining a suitable interconnection agreement was to assert its rights under Section 252(i) of the Act. As the Commission has observed, Section 252(i) is critically important in preventing discrimination. *See Local Competition Order* at ¶ 1321.[1] After considering its alternatives under the then-effective "whole contract" rule for opting in, Global NAPs concluded that the three-year agreement between Bell Atlantic and MFS provided the best combination of rights and obligations to meet Global NAPs' own business needs.

[1] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1986) ("*Local Competition Order*").

3. Bell Atlantic was having none of it. Bell Atlantic already knew that Global NAPs' market entry strategy includes providing Internet Service Providers ("ISPs") with the dial-up connections that they need in order to meet the burgeoning consumer demand for access to the Internet. Consequently, Bell Atlantic sought to impose several onerous conditions on the to-be-established Bell/Global NAPs agreement that were not contained in the Bell/MFS agreement. Most prominent among these were (a) a refusal to pay any reciprocal compensation for ISP-bound calls at all; (b) an insistence that whatever reciprocal compensation payments might be made be set at a per-minute rate well below the rate included in the New Jersey Board-approved MFS agreement; and (c) an insistence that Global NAPs was not entitled to the stability and predictability of a 3-year contract, even though Bell Atlantic had provided such stability and predictability to MFS.

4. An arbitration proceeding under the auspices of the New Jersey Board followed. Pursuant to Section 252(b)(4)(C) of the Act,[2] the Arbitrator issued his award on October 26, 1998.[3] On the three key disputed issues, he concluded: (a) that the MFS agreement which Global NAPs was opting into contemplated compensation for ISP-bound calls; (b) that the compensation rates in the MFS agreement were the rates to which Global NAPs was entitled; and (c) that the substantive provisions of the MFS agreement indicated that the proper term for the Global NAPs/Bell Atlantic agreement should be three years.

5. Under the rules of the New Jersey Board, the parties had five business days (until November 1, 1998) to enter into an agreement that implemented the Arbitrator's award and to submit that agreement to the New Jersey Board for review in accordance with Section 252(e)

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[2] Section 252(b)(4)(C) requires the state commission to:

> resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) [of section 252] upon the parties to the agreement, and [to] conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection] under this section.

[3] A copy of this document is attached hereto. *See* Attached "Exhibits to Petition of Global NAPs, Inc."

of the Act. Bell Atlantic (in retrospect, probably predictably) refused to comply with those rules. Instead, relying on the *GTE ADSL Order* — which expressly stated that it did ***not*** apply to dial-up calls to ISPs of the sort implicated by the Arbitrator's award — refused to comply with the Board's requirement.[4] After a rapid spate of filings, each party filed with the Board its version of a short-form interconnection agreement that would be used to "adopt" the MFS Agreement. Global NAPs' short-form agreement implemented the Arbitrator's award in full. Bell Atlantic's provided a variety of hedges, outs, and qualifications designed to deprive Global NAPs of the benefit of the award, primarily but not exclusively on the issue of compensation for ISP-bound traffic.

6. The New Jersey Board, therefore, by early November 1998, had before it everything it needed to finally decide this case: the Arbitrator's award, the parties' competing "adoption agreements" to implement the award, and briefing from the parties on why their positions were right and their opponents' positions were wrong.

7. Global NAPs then began waiting for the Board's final order under Section 252(e). Such an order would either approve the Global NAPs/Bell Atlantic contract in accordance with the arbitration award, or reject some aspects of that award and establish different terms, in accordance with the standards of Section 252(e).

8. Global NAPs is still waiting.

9. It is now more than ***thirteen months*** since Global NAPs originally requested interconnection with Bell Atlantic and more than ***eight months*** since Global NAPs sought to avail itself of the supposedly "expedited" process under Section 252(i) to avoid the difficulties of negotiating and arbitrating a CLEC-specific interconnection agreement.[5] The New Jersey Board

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[4] GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, *Memorandum Opinion and Order*, CC Docket No. 98-79 (released October 30, 1998). Note that paragraph 2 of that Order specifically states that the reasoning contained in it is not determinative of the question of reciprocal compensation for ISP-bound calls.

[5] *See Local Competition Order* at ¶ 1321.

has simply failed to issue any order in this matter since the Arbitrator's decision last fall. Consequently, since that time, Global NAPs has been excluded from the New Jersey local telecommunications market, in direct contravention of federal law, due to a combination of Bell Atlantic's anticompetitive intransigence and the New Jersey Board's inexplicable failure to act on the matter before it.

10. Global NAPs is well aware of the controversy surrounding reciprocal compensation for ISP-bound calls (including the rates to be paid for such calls), as well as the controversy surrounding incumbent local exchange carrier ("ILEC") fears that Section 252(i) rights should be limited in various ways to prevent "daisy-chaining" of agreements that the ILEC no longer wants to honor. Each and every one of these issues was fully and fairly litigated before the Arbitrator, and fully and fairly presented to the New Jersey Board for decision.[6] Global NAPs acknowledges that reasonable minds can differ on some of these issues and that the New Jersey Board may have found reaching a decision to be difficult. Some decision is required, however, and none has been forthcoming.

11. In this regard, precedent plainly supports this Commission taking jurisdiction in this matter. As the Commission has explained:

> ... Congress intended that the process of negotiating, and, when necessary, arbitrating interconnection agreements would have some definite end. Specifically, Section 252(b)(4)(c) requires state commissions to resolve any open issues set forth in an arbitration petition and response ***within nine months after the date on which the incumbent LEC received the request for interconnection.*** Further, section 252(c)(3) requires a state commission that is conducting an arbitration to ***provide a schedule for implementation of the terms and conditions derived through arbitration*** by the parties to the arbitration. We interpret these provisions as requiring state commissions, at the very least, ***to ensure that they do not forestall the completion of interconnection negotiations by failing to resolve all the issues clearly presented to them in a timely manner.***[7]

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[6] *See* attached Exhibits.

[7] In the Matter of Petition of MCI for Preemption Pursuant to Section 252 (e)(5) of the Telecommunications Act of 1996, *Memorandum Opinion and Order*, CC Docket 97-166, 12 FCC Rcd 15594 (Sept. 26, 1997) (emphasis added).

Global NAPs believes that the New Jersey Arbitrator reached the correct result in this controversy in all material respects. The point of this Petition, however, does not depend on who is right or wrong with regard to the underlying controversy. Whatever the range of legally permissible outcomes in this dispute, Global NAPs is long since entitled to ***some*** interconnection contract with Bell Atlantic in New Jersey on ***some*** terms that comply with the Act. Global NAPs will not speculate on what considerations may have led the New Jersey Board to abdicate its responsibility to establish such terms, but it has plainly and irrevocably done so.

12. Global NAPs submits that the facts outlined above fully and completely "prove that the state has failed to act to carry out its responsibilities under section 252 of the Act," in accordance with 47 C.F.R. § 51.803(b). As required by 47 C.F.R. § 51.803(a)(1), this Petition is supported by the Affidavit of William J. Rooney, Jr., Global NAPs' Vice President and General Counsel. Mr. Rooney was personally involved in the negotiations with Bell Atlantic leading up to the New Jersey arbitration proceedings; personally involved in those proceedings themselves; and personally involved in the filings with the New Jersey Board following the Arbitrator's award.

13. In order to expedite the process of the Commission's review of this matter — in effect, to avoid "re-inventing the wheel" — Global NAPs is attaching to this petition the several relevant documents, including Global NAPs' post-hearing brief before the New Jersey Arbitrator, addressing all open issues, as well as the Arbitrator's award. Global NAPs stands ready to provide any additional materials from the New Jersey proceedings, as well as any briefing or other submissions on the merits that the Commission might require.

14. In the particular circumstances of this case, however, Global NAPs respectfully requests that the Commission assume jurisdiction of this matter in the state in which the New Jersey Board abandoned it. Specifically, Global NAPs does not suggest that the Commission needs to, or should, directly re-arbitrate the questions involved in the dispute between Global NAPs and Bell Atlantic. To the contrary, the Commission should recognize that as far as litigation is involved, everything in this case that needs to be done has already been

done, except for the issuance of a legally binding order from a regulator directing Bell Atlantic to comply with the Arbitrator's award. As a result, in these circumstances, Global NAPs requests that the Commission should immediately apply the terms of 47 C.F.R. § 51.807(h). That rule states that:

> Absent mutual consent of the parties to change any terms and conditions adopted by the arbitrator, the decision of the arbitrator shall be binding on the parties.

15. In sum, then, Global NAPs respectfully requests that the Commission (a) preempt any remaining jurisdiction over this case that may be retained by the New Jersey Board and (b) enter an order directing Bell Atlantic to sign an agreement that complies with the terms of the Arbitrator's award in this matter.

Respectfully submitted,

GLOBAL NAPS, INC.

By: _____

Christopher W. Savage
Karlyn D. Stanley
COLE, RAYWID & BRAVERMAN, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006
202-659-9750

William J. Rooney, Jr
General Counsel, Global NAPs Inc.
Ten Merrymount Road
Quincy, MA 02169
617-507-5111

Date: May 5, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Petition of Global NAPs, Inc. for Preemption of the Jurisdiction of the New Jersey Board of Public Utilities Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996	CC Docket No. _____

AFFIDAVIT OF WILLIAM J. ROONEY, JR.

William J. Rooney, Jr., of legal age, deposes and states the following under penaly of perjury:

1. My name is William J. Rooney, Jr. I am Vice President and General Counsel of Global NAPs, Inc. ("Global NAPs").

2. I am filing this affidavit in support of Global NAPs' petition to have the Federal Communications Commission ("Commission") preempt the jurisdiction of the New Jersey Board of Public Utilities with regard to the interconnection dispute between Global NAPs and Bell Atlantic-New Jersey.

3. I have been personally involved in all of Global NAPs' interconnection negotiations with Bell Atlantic, including our negotiations with Bell Atlantic-New Jersey. I am, therefore, personally familiar with the history and conduct of those negotiations and with the subsequent arbitration and related proceedings before the New Jersey Board of Public Utilities.

4. I have read the accompanying "Petition of Global NAPs, Inc." to preempt the jurisdiction of the New Jersey Board of Public Utilities. The statements in that petition are true and correct to the best of my knowledge and belief. Specifically, although Global NAPs began negotiations with Bell Atlantic in March 1998, and although the arbitrator in New Jersey issued his decision regarding the dispute on October 26, 1998, the New Jersey Board of Public

Utilities has not, as of the date hereof, issued an order which establishes the terms and conditions on which Global NAPs may interconnect with Bell Atlantic, nor has it compelled Bell Atlantic to enter into an agreement with Global NAPs that conforms to the terms of the arbitrator's award.

5. As a result of this failure to act on the part of the New Jersey Board of Public Utilities, Global NAPs is without an interconnection agreement with Bell Atlantic as of today, more than a year after negotiations between the two companies began.

William J. Rooney, Jr.

Subscribed and sworn before me this 5th day of May, 1999.

Nichele V. Rice
Notary Public District of Columbia
My Commission Expires June 30, 2000

EXHIBITS TO

PETITION OF GLOBAL NAPs, INC.

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October 20, 1998

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Executive Director, Harvard Electricity Policy Group
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John F. Kennedy School of Government
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79 John F. Kennedy Street
Cambridge, MA 02138

Re: Disputed Issues — Global NAPs/Bell Atlantic Arbitration

Dear Mr. Brown:

This letter is being filed on behalf of Global NAPs, Inc. in response to your request for updated statements of positions for each of the parties. As of now, the issues for decision, as Global NAPs sees them, are essentially those stated in Global NAPs' September 23, 1998 letter and the subsequent joint statement of issues filed on Monday September 28, 1998.

Briefly, as part of its effort to negotiate an interconnection agreement with Bell Atlantic, Global NAPs sought to "opt in" to the pre-existing agreement between Bell Atlantic and MFS. Bell Atlantic would not permit Global NAPs to do so unconditionally, as required by 47 U.S.C. §§ 252(i) and 251(c). Instead, Bell Atlantic sought to impose four material conditions on Global NAPs that MFS itself did not have to accept. These are:

1. Bell Atlantic wants to avoid its obligation to pay Global NAPs terminating compensation at the rates included in the MFS agreement, and, instead, to force Global NAPs to accept lower rates.

2. Bell Atlantic wants to avoid its obligation to pay Global NAPs terminating compensation for calls made to Internet Service Providers ("ISPs") who purchase local exchange service from Global NAPs.

3. Bell Atlantic wants to force Global NAPs to accept a version of the MFS agreement with a term of only about eight (8) months, even though it entered into a three-year contract with MFS.

4. Bell Atlantic wants to force Global NAPs to agree, sight unseen, to be bound by any changes in Bell Atlantic's agreement with MFS that Bell Atlantic and MFS might subsequently negotiate.

My letter of September 23 describes why each of these Bell Atlantic demands is unsupported by law or sound policy. Arguments and testimony at tomorrow's hearing will address these issues in more detail.

Stated in terms of issues for decision, Global NAPs seeks a ruling that it is not required to accept any of the conditions identified above in a "opted into" agreement with Bell Atlantic. In other words, we seek a ruling that Bell Atlantic must enter into a three-year contract with Global NAPs on the same terms and conditions as in the MFS agreement, without the hedges, limitations and conditions that Bell Atlantic now wants to put on that agreement, including, specifically, the same terminating compensation rates as in the MFS agreement, with no "carve out" for calls to ISPs.

As noted above, this statement of the issues is essentially identical to that provided by Global NAPs — and the parties jointly — in the earlier letters. If for some reason Bell Atlantic chooses to revise its position and posit different issues for decision in its filing later today, I trust that Global NAPs will be given an opportunity to address Bell Atlantic's new position (if any) at tomorrow's hearing.

I look forward to meeting you in person tomorrow.

Very truly yours,

Christopher W. Savage
Counsel for
GLOBAL NAPS, INC.

cc: Bell Atlantic (R. Lewis/J. Messenger)
James Corcoran

Bell Atlantic - New Jersey
540 Broad Street
Room 1700
Newark, NJ 07101
973 649 2836 Fax 973 482 8466
e-mail: robert.a.lewis@BellAtlantic.com

Robert A. Lewis
Counsel
Legal Department

October 20, 1998

Mr. Ashley C. Brown
Executive Director
Harvard Electricity Policy Group
Center for Business and Government
John F. Kennedy School of Government
Harvard University
79 John F. Kennedy Street
Cambridge, MA 02138

Re: Updated Statement of Disputed Issues - Global NAPs Arbitration

Dear Mr. Brown:

Pursuant to your request on the October 19, 1998 conference call, attached is an updated statement of issues on behalf of Bell Atlantic - New Jersey ("BA-NJ").

(1) Does Section 252(i) require BA-NJ to allow Global NAPs ("GNAPs") to "opt in" to the 1996 MFS Agreement at all, where GNAPs is essentially an Internet provider rather than a bona fide local exchange carrier?

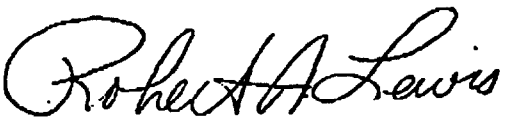
(2) Does Section 252(i) require BA-NJ to allow GNAPs to "opt in" to the 1996 MFS Agreement at all, where GNAPs is not prepared to agree to, and cannot, meet all the terms and conditions of the MFS-NJ agreement?

(3) Does Section 252(i) require BA-NJ to allow GNAPs to "opt in" to the 1996 MFS Agreement at all, where BA-NJ's costs of interconnecting with GNAPs under the MFS Agreement would be significantly greater than BA-NJ's costs of interconnecting with MFS itself?

(4) Does Section 252(i) require BA-NJ to allow GNAPs to "opt in" to the 1996 MFS Agreement at all, where BA is only obligated to make a previously negotiated agreement available to other CLECs for a "reasonable time," and under all the circumstances, that "reasonable time" for the MFS-NJ agreement has expired?

Please call me if you have any questions concerning this submission.

Very truly yours,



Robert A. Lewis

cc: via fax:

James Corcoran
Chris Savage
Bill Rooney
John Messenger

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October 23, 1998

Mark W. Musser, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Re: BA-NJ/Global NAPs Arbitration: Final Brief

Dear Mr. Musser:

Attached is an original and ten (10) copies of the final version of Global NAPs' brief before the arbitrator in its arbitration with BA-NJ. This version includes transcript citations that were not available at the time the brief was submitted to the arbitrator. He has been provided copies of the changed pages.

Very truly yours,

Christopher W. Savage
Counsel for Global NAPs, Inc.

cc: Bell Atlantic
Mr. Corcoran & Ms. Artale

83436.1

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Bell Atlantic-New Jersey, Inc.	Docket No. TO98070426

POST-HEARING BRIEF OF GLOBAL NAPs, INC.

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Counsel For Global NAPs, Inc.

Dated: October 23, 1998

Table of Contents

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Bell Atlantic-New Jersey, Inc.	Docket No. TO98070426

POST-HEARING BRIEF OF
GLOBAL NAPs, INC.

Pursuant to the ruling of the Arbitrator at the October 21, 1998 hearing in this matter, Global NAPS, Inc. ("GNAPs") respectfully files this post-hearing brief.

1. Introduction and Summary.

This is a very simple case. GNAPs, a competing local exchange carrier ("CLEC"), has a right under Section 252(i) of the Communications Act of 1934, as amended (the "Act") to "opt in" to the interconnection agreement that Bell Atlantic-New Jersey, Inc. ("BA") has with MFS Intelenet of New Jersey, Inc. ("MFS").[1] Specifically, GNAPs is entitled to interconnect with BA "upon the same terms and conditions as those provided in the [MFS] agreement." 47 U.S.C. § 252(i).

The MFS Agreement expressly states that it is the entire agreement of the parties.[2] Whatever else BA may be obliged to do, therefore, it is obliged to execute an agreement with GNAPs that reflects all the provisions — and only the provisions — of

[1] This agreement is in evidence in this matter as BA Exhibit 1. It will be cited in this Brief as the "MFS Agreement."

[2] MFS Agreement, Section 29.17.

the MFS Agreement. A ruling imposing this simple requirement on BA would adopt the ancient maxim, "sufficient unto the day is the evil thereof."[3] By way of exegesis: while it is quite clear that the parties have a number of disagreements about how the MFS Agreement should apply in particular situations, there is no absolute need, in the abstract, for the Arbitrator to decide those issues now. To the contrary, the only issue the Arbitrator ***must*** decide now is the question of the term of the agreement — three years or eight months?

As to all other issues, the Arbitrator could simply rule that both parties are bound by the substantive provisions of the agreement — whatever they are. If BA later claims that GNAPs is violating those provisions, that claim could be addressed under the dispute resolution sections of the agreement itself.[4] Similarly, once GNAPs sends BA a bill, BA could dispute the bill if it believed that GNAPs was charging too much per minute, or if it believed that some of the minutes for which GNAPs was charging were not properly subject to call termination payments at all.[5]

For the reasons described below, GNAPs believes that the Arbitrator should resolve each of the four issues set out in the parties' joint September 28, 1998 submission.[6] This is because it is clear that, in addition to the term of the agreement, the parties do indeed dispute what the agreement means in at least one critical respect. Specifically, BA agreed to pay MFS $0.009/minute for a year, followed by a "blended" per-minute rate somewhere between $0.009 and $0.007 for two more years, but now

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[3] *See Clever v. Cherry Hill Twp. Bd. of Educ.*, 838 F. Supp. 929, 940 & n.14 (D.N.J. 1993), *quoting* Matthew 6:34 (King James version).

[4] *See, e.g.*, MFS Agreement, Section 9.4.1 (discontinuance of interconnection on 30 days' notice in cases of "repeated or willful violation of and/or a refusal to comply with this Agreement"); Section 22.3 (termination for default, upon 60 days' notice); Section 29.9 (general dispute resolution procedures).

[5] MFS Agreement, Section 29.8.4 (special provisions for disputed bills).

[6] Joint Submission of Issues (Sept. 28, 1998).

claims that those rates have been superseded by a subsequent Board order.[7] Moreover — while BA was notably vague on this point at the hearing — the parties may still have a disagreement over whether calls that BA end users make to Internet Service Providers ("ISPs") served by GNAPs are subject to terminating compensation at all. Resolving these issues now would permit the parties to move forward with a better understanding of the terms of their business relationship.[8]

Furthermore, stepping back from these specific disputes, another and more serious problem emerges: BA's conduct shows that it has been acting in bad faith in its dealings with GNAPs in order to delay GNAPs' entry into the New Jersey market. There is no good faith basis, even under BA's stated positions, for BA to prevent GNAPs from operating under the MFS Agreement at least through June 1999. If BA had been acting in good faith, it would have been a simple matter to execute the MFS Agreement with GNAPs while reserving the parties' rights to dispute later questions such as when the agreement expires and what rate applies to call termination. By refusing to allow GNAPs to do so, BA is accomplishing the classic goal of a monopolist protecting its turf: delay. BA's negotiating strategy with GNAPs constitutes anticompetitive conduct, pure and simple.[9]

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[7] In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services, *Telecommunications Decision and Order*, Docket No. TX95120631 (N.J. Bd. of Pub. Util. December 2, 1997) ("*Generic Rate Order*").

[8] BA also claimed that it had the right to impose on GNAPs modifications in the MFS/BA relationship that those two firms may negotiate following the execution of a separate GNAPs/BA agreement. BA presented no evidence or argument to support this claim at the hearing, and the Arbitrator should consider it waived. *See* Tr. 237.

[9] While GNAPs is entitled to a three-year deal for the reasons described below, the Arbitrator should consider that BA's conduct is especially inappropriate if, as BA asserts, any GNAPs "version" of the MFS Agreement would terminate in June 1999. Simply stated, if BA is correct that the MFS Agreement runs out on a date certain, then BA ***knows*** that every month of delay that it can impose on GNAPs is a month in which it has protected itself from competition under the terms of that agreement.

The Arbitrator and the Board cannot properly countenance such behavior. For this reason, if for no other, GNAPs urges the Arbitrator to actually decide the issues posed by the parties in the joint submission on September 28, 1998, so that BA may not simply retreat from its delaying tactics of the last few months to additional delaying tactics when GNAPs tries to operate under the agreement.

* * * * *

The remainder of this brief is organized as follows. Section 2 shows that the MFS Agreement is as an agreement with a three-year term, and explains why allowing GNAPs to opt into a three-year agreement is not unfair to BA. Section 3 explains why the Board's *Generic Rate Order* has no impact on the rates that BA voluntarily agreed to pay MFS for call termination, or on GNAPs' right to opt in to the MFS Agreement that contains those rates. Section 4 explains why BA's allegations about how GNAPs might perform its obligations under the MFS Agreement provide no basis for denying GNAPs the right to opt in to that agreement in the first place.

Finally, there is the question of calls that BA end users make to ISPs. Evidence at the hearing revealed that BA is willing to pay for such calls;[10] that BA has publicly acknowledged that such calls are "local" in nature;[11] and even that BA understands that the "default" situation — *i.e.*, what applies if there is no statement to the contrary — is that such calls are subject to terminating compensation payments.[12] In short, it seems that BA no longer asserts that the mere fact that the GNAPs customer that the BA customer is calling is an ISP somehow disqualifies the call from being

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[10] *See* BA Exhibit 2 (the "Cablevision Agreement") at Section 5.7.2.2.

[11] *See* GNAPs Exhibit 2 (BA FCC filing) at 3.

[12] Tr. 200 ("Our customer does make ***currently what is viewed as a local call, yes.*** I don't know how that might ***change*** under the FCC.")

subject to terminating compensation.[13] Out of an abundance of caution, however, GNAPs is attaching an Appendix that shows that calls to ISPs are — and have long been — routinely regarded as "local" calls, and that every regulatory body and court to have addressed the issue has held that calls to ISPs are subject to terminating compensation obligations under Section 251(b)(5) of the Act.

2. The MFS Agreement Is An Agreement With A Three-Year Term.

The MFS Agreement runs for two weeks short of three years, from July 16, 1996 through July 1, 1999.[14] BA, however, contends that the MFS Agreement is not — despite appearances — a three-year deal. To support this position, moreover, BA argues that, if the agreement has a three-year term, this would bind BA to the terms of that agreement forever, as CLEC after CLEC opts into it in a never-ending chain. Bell Atlantic's witness Mr. Masoner specifically claimed at the hearing that changes in governing regulatory requirements in particular make it necessary to bring the saga of the MFS Agreement to a close as to all CLECs at the end of June 1999. *See* Tr. at 143.

BA is wrong on both counts. First, the effect of BA's position is that GNAPs is only entitled to an agreement that will run for eight months (November 1998 through June 1999). As described below, however, treating the agreement as having an eight month term would eviscerate many of the agreement's substantive provisions. An eight month deal, therefore, ***cannot*** be an agreement that provides GNAPs with interconnection with BA "upon the same terms and conditions as those provided in the [MFS] agreement," and so cannot comply with Section 252(i).

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[13] BA's argument on the topic of calls to ISPs appears to have mutated into a prospective speculation that GNAPs will engage in conduct that BA believes constitutes "misuse" of NXX codes. As discussed in Section 4.c., *infra,* this claim, too, is baseless.

[14] *See* MFS Agreement, Preamble (page 1) (defining July 16, 1996 as the "Effective Date") and signature block preamble (page 62) (indicating the agreement was effective as of "this 16th day of July, 1996"); *id.*, Section 22.1 (stating that the agreement "continues in effect until" July 1, 1999).

Second, even though the MFS Agreement is indeed inherently a three-year deal, that does not mean that BA is stuck with it forever. To the contrary, BA must comply with the MFS Agreement only as long as its terms are "nondiscriminatory" and "consistent with the public interest, convenience and necessity," *see* 47 U.S.C. § 252(e)(2)(A). The Board specifically found, at BA's request, that the terms of the MFS Agreement meet that standard.[15] If BA can prove to the Board in an open and appropriate proceeding that they no longer do so, the Board could issue an order relieving BA of any further obligation to make the MFS Agreement available for opting in under Section 252(i). BA, however, has not made (and in this proceeding cannot make) such a showing.

a. Many Substantive Provisions Of The MFS Agreement Inherently Contemplate A Three-Year Term.

Setting up interconnection arrangements between two telecommunications networks costs money and takes time. Specific interconnection locations have to be agreed upon. Traffic forecasts have to be developed and reviewed. Equipment and communication links have to be ordered, shipped, received, installed and tested.

The MFS Agreement recognizes the fact that things take time in various ways that are integral to the operation of the substantive provisions of the contract. First and foremost, the agreement on its face runs for a three-year period (from July 16, 1996 though July 1, 1999). This three-year term gives both parties the ability to make and implement business decisions — including decisions that can involve purchasing millions of dollars of telecommunications equipment — within a stable contractual environment.

Other material provisions of the agreement also show that it is intended to have a three-year term. These are discussed below in some detail because — since they

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[15] *See* GNAPs Exhibit 1 (Board Order approving MFS Agreement) at 5.

come from the MFS Agreement itself — they provide the best possible evidence of how the parties intended for the agreement to operate.[16] Each of these provisions is a material aspect of the "terms and conditions" in the agreement — provisions which GNAPs will be denied if it is forced to accept an eight-month term.

- **Schedule 3.0.** Section 3.0 refers to Schedule 3.0, which is about 3 pages behind the signature page (page 63). This Schedule establishes implementation "Milestones" over a six-month period from the "LATA Start Date" (which, for North Jersey (LATA 224) is the Effective Date) to the "Interconnection Activation Date," *i.e.*, the date when interconnection has actually been established. Schedule 3.0, therefore, necessarily contemplates that the agreement will continue for a substantial period of time beyond the six months allotted to get physical interconnection arrangements up and running. Indeed, with six months to get interconnection established, it would be senseless to conclude that the term of the agreement is only eight months.

- **Section 4.1.2 and Section 4.3.1.** Section 4.1.2 states that, until a particular type of system contemplated by the agreement (a "SONET" system, defined in Section 1.67) is established "in accordance with subsection 4.3 ... the Parties agree to adopt an ***initial*** interconnection architect[ure]." Section 4.3 is entitled "***Initial*** Architecture," and states that the parties shall provide for certain specified "***initial*** interconnection arrangements ... for a period of no more than ***eighteen (18) months*** after the ***later*** of the Effective Date and the LATA Start Date set forth for the LATA in Schedule 3.0." This section, therefore, inherently assumes that it takes an extended period of time to establish interconnection arrangements, and expressly allows a period of ***one-and-one-half years*** for an "initial" arrangement to be in effect. It is impossible to square this provision with the eight month term BA claims is all that GNAPs is entitled to now.

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[16] The analysis below, based on the terms of the MFS Agreement, is inherently probative of the meaning of that agreement. By contrast, arguments based on statements such as those made by Mr. Masoner at the hearing regarding what he (privately) intended during negotiations with MFS — and even what Mr. Masoner and MFS representatives may have discussed — are inherently unreliable This is so both because it is impossible in an arbitration between BA and Global NAPs to determine what MFS said and thought, and because the agreement, by its terms, does not permit consideration of such statements. Section 29.17 states that the terms of the written agreement "constitute the ***entire agreement*** between the Parties with respect to the subject matter hereof, ***superseding all prior understandings, proposals or other communications, oral or written.***" The agreement, in short, speaks for itself and is the sole authoritative source for the intentions of MFS and BA in entering into it.

- **Section 10.1.** Section 10.1 requires the parties to meet to establish a "Joint Plan" regarding various technical aspects of their interconnection arrangements. This plan is to be developed by "December 1, 1996." The plan, moreover, is to deal with (among other items) the "actual meet point locations on the SONET system" referred to above, that would not be in place for ***eighteen months*** following execution of the agreement.

  This illustrates two points. First, it is impossible for any new CLEC (such as GNAPs) to develop a "Joint Plan" with BA by December 1, 1996. That date has already passed, which shows that the specific dates listed in the agreement need to be adjusted to reflect when the new, opted-into agreement is executed.

  Second, the agreement plainly must continue well beyond the eight month period BA says now applies. This is because it would be senseless to spend four-and-one-half months (the time from the July 16, 1996 "Effective Date" to the December 1, 1996 date for completing the plan) of an eight-month term to develop an implementation plan, part of which relates to the implementation of SONET architecture eighteen months later.

- **Section 10.3.** Section 10.3 requires the CLEC to "provide BA a one (1) year traffic forecast." Moreover, this "initial" forecast "shall be updated and provided to BA on a quarterly basis," *i.e.*, the CLEC is required, each quarter, to forecast traffic for the following twelve-month period. This provision makes no sense if, as BA contends, the agreement that GNAPs would execute would only have an eight-month term.

- **Section 14.5.2.** Section 14.5 relates to the payment of terminating compensation in connection with a particular class of calls: calls to telephone numbers that were originally assigned to BA customers but that are retained by those customers after they have become CLEC customers, using "interim" number portability to allow the number to be retained. Section 14.5.2 requires that terminating compensation payments applicable to calls to such numbers be based on certain estimates.

  These estimates are significant here in two respects. First, the initial estimate is to be made by "the Interconnection Activation Date in each LATA." As discussed above (Schedule 3.0), the first "Interconnection Activation Date" is a milestone that is six months from the effective date of the agreement. The estimate, however, is supposed to cover "the prospective six months," *i.e.*, the six month period ***following*** the date of the estimate. It would make no sense to provide a "prospective six month" estimate six months into an agreement that only had a term of eight months.

  Second, Section 14.5.2 directs the parties to establish new estimates "[o]n the date which is six months ***after*** the Interconnection Activation Date" — *i.e.*,

twelve months after the agreement is effective — "and ***thereafter*** on ***each succeeding*** six month anniversary of such Interconnection Activation Date." In an agreement with a three-year term, this requirement to produce estimates every six months is perfectly sensible. In an eight-month agreement of the sort that BA seeks to impose on GNAPs, this requirement is senseless.

- **Section 27.2.** This section relates to certain performance standards for BA. A type of performance failure of particular concern is a "Specified Performance Breach" (defined in Section 27.1.1). Under Section 27.2, if BA commits a Specified Performance Breach "during the term of this Agreement," the parties will meet to discuss the need for an amendment to the agreement to provide for liquidated damages; the question of a liquidated damages term will be arbitrated if they cannot agree whether one is justified.

  But Section 27.2 contains an exception: "if BA commits a Specified Performance Breach during [the] ***initial*** nine (9) months of this Agreement, the parties agree to meet at the ***end*** of the nine-month period." If, as BA now claims, GNAPs is required to accept an eight-month deal, the entire provision regarding establishing a liquidated damages clause is ineffective. It is also nonsensical to refer to the "initial nine (9) months" of an agreement that terminates in eight months.

- **Section 27.5.** This section requires both parties to keep certain records "of BA's performance under this Agreement ... and its compliance with the Performance criteria during the ***initial*** nine-month-period." As with Section 27.2, it is nonsensical to refer to the "initial nine-month period" of an eight-month contract.

- **Exhibit A.** Exhibit A to the agreement (beginning about 10 pages following the signature page) establishes the prices of the services that BA and MFS will provide to each other. It is divided into prices for "BA Services, Facilities and Arrangements" (the first 8 pages of the Exhibit) and "MFS Services, Facilities and Arrangements (the next 3 pages). Item 13.a under "BA Service" is the rate for "Reciprocal call termination" that will apply to calls delivered by MFS to BA. Item 3.a. under "MFS Service" is the rate for "Reciprocal call termination" that will apply to calls delivered by BA to MFS.

  In each case, the rate is $0.009 per minute during the "First year" and a blended rate (set pursuant to a formula in note 13 to the Exhibit) "After first year." These provisions (as well as the formula in note 13) plainly contemplate an agreement that will have not only a "first year," but also at least two subsequent years. Indeed, Section B.1 of note 13 requires MFS's charges to BA to be "recalculated once ***each year*** on ***each*** anniversary of the Effective Date," and indicates that the "***initial***" recalculation "shall be the ***first*** anniversary of the Effective Date."

  This key, material provision — how much each party will get paid for terminating traffic from the other party — inherently reflects a term that will permit there to

be at least ***two*** "anniversary dates" of the "Effective Date." This arrangement is impossible in an eight-month agreement of the type BA is now trying to foist on GNAPs. It is, however, directly consistent with a three-year agreement of the type that BA actually provided to MFS and that GNAPs wants to opt in to.

The discussion above shows that numerous substantive, material terms of the MFS Agreement would simply make no sense if, as BA claims, it can force GNAPs to accept the "same" agreement, but with an eight-month term. The discussion shows, in other words, that an eight-month version of the MFS Agreement is not the "same" agreement at all, because an eight-month agreement would not give GNAPs interconnection with BA "upon the same terms and conditions as those provided in the agreement" with MFS, as required by 47 U.S.C. § 252(i).

These factors no doubt contributed to the Board's view of the MFS Agreement at the time the agreement was approved. As shown in GNAPs Exhibit 1 (the Board's order approving the MFS deal), when the Board reviewed the matter, it understood that "[t]he Agreement ***runs for three years*** and sets for the terms and conditions under which MFS will interconnect with and/or resell certain services of BA-NJ." GNAPs Exhibit 1 at 2. This simple statement shows that the Board understood what BA now tries to deny: an agreement that runs for three years is a three year agreement.[17]

b. BA Is Not Trapped Forever By The Terms Of The MFS Agreement.

BA's objection to the seemingly obvious conclusion that the MFS Agreement has a three year term is that if the specific termination date in the MFS

[17] As a legal matter, GNAPs submits that BA, having affirmatively sought and obtained the Board's approval of the MFS Agreement, is bound by the terms of the order of the Board granting BA the relief sought. If BA actually considered the specific termination date, as opposed to the three-year term, to be a material aspect of its agreement with MFS, then BA should have explained that fact to the Board in its petition for approval of the agreement, and then sought reconsideration or clarification when the Board issued what BA must have considered a materially erroneous order. *See* Tr. 146-47.

Agreement is not treated as inviolate for purposes of Section 252(i), BA will always be subject to the terms of its deal with MFS, since one CLEC after another could choose to "opt in" to the MFS Agreement, year after year, forever. This objection is baseless.

At the outset, recall that the only reason that the MFS Agreement is available for opting into at all is that the Board has affirmatively found that agreement to be "non-discriminatory and consistent with the public interest, convenience, and necessity." GNAPs Exhibit 1 at 5, *quoting* 47 U.S.C. § 252(e)(2)(A) (statutory standard for approval of negotiated agreements). As long as that Board finding remains in effect, there nothing wrong with requiring BA to apply the terms of the MFS Agreement to CLECs that choose to opt into it, in each case for three-year terms. Indeed, as long as that Board finding remains in effect, it would be odd to conclude that — ***despite*** the fact that the MFS Agreement is "non-discriminatory and consistent with the public interest, convenience, and necessity" — CLECs could ***not*** opt into it.

The fact that the MFS Agreement has been specifically approved also provides the answer to BA's fears that it might have to abide by that agreement even if conditions have changed in a material way. If BA believes that the terms of the MFS Agreement have ***become*** "discriminatory" or ***in***consistent "with the public interest, convenience, and necessity," BA is free to try to persuade the Board of its view. If the Board were to be persuaded, then ***the Board itself*** would issue an order stating that it will not approve any subsequent CLEC efforts to opt in to the MFS Agreement, because of ***the Board's*** finding that such agreements no longer meet the standard for approval contained in 47 U.S.C. § 252(e)(2)(A).[18]

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[18] BA suggested at the hearing that its knowledge that GNAPs and other CLECs might want to target ISPs (or other customers with large incoming traffic flows) might be such a changed circumstance. As shown in Section 4.b. of this Brief, *infra,* any such suggestion must be rejected because the agreement itself plainly contemplates — and expressly provides for — the situation in which traffic is significantly out of balance as a result of the CLEC's decisions regarding selling services to particular customer groups.

BA, in short, has a clear and simple means for ensuring that it cannot be forever subject to the terms of an agreement that has become unreasonable due to changed circumstances or the simple passage of time. But it is the Board, not BA, that is responsible for making this determination.[19]

In this regard, Mr. Masoner suggested that regulatory changes might invalidate certain provisions of the MFS Agreement over time. *See* Tr. 143. This argument is specious. Section 28 of the agreement requires the parties to negotiate modifications to reflect changes in applicable laws and regulations. Moreover, the Board's order approving the MFS Agreement specifically requires that "[s]ubsequent amendments or modifications of this Agreement shall be submitted to, and reviewed by, the Board." GNAPs Exhibit 1 at 5. The MFS Agreement itself, therefore, contains its own assurance that it will keep up with changes in law.

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The discussion above shows that the only way that GNAPs can obtain interconnection with BA "upon the same terms and conditions as those provided in the agreement" with MFS, 47 U.S.C. § 252(i), is by giving GNAPs a three-year deal, and that BA's objections to doing so are baseless. The easiest way to implement a three-year

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[19] The Board probably has inherent authority to consider this question as part of its duties to approve interconnection agreements under 47 U.S.C. § 252(e). In addition, it also has sufficient authority to take such action under New Jersey law. As the Board itself has observed, it has "been given authority by the Legislature to revisit and modify prior decisions. *N.J.S.A.* 48:2-40 expressly provides that the Board at any time may order a rehearing and/or extend, revoke or modify an order made by it." *See Generic Rate Order* at 251. The Board cannot exercise this state law authority in a manner contrary to federal law, but it would not contravene federal law for the Board to recognize changed circumstances in an order issued after notice to all affected parties and consideration of relevant evidence. Such a proceeding would be, in effect, a generic proceeding regarding the application of the terms of Section 252(e)(2)(A), in the same way that the *Generic Rate Order* grew out of a generic proceeding regarding the application of the terms of Section 252(d).

deal for GNAPs is to adjust the specific dates in the contract forward by 27½ months.[20] GNAPs respectfully requests that the Arbitrator issue a ruling directing BA and GNAPs to execute such an agreement.

3. The *Generic Rate Order* Has No Bearing On The MFS Agreement, Which Contains Negotiated Rates, Not Arbitrated Rates.

BA and MFS voluntarily agreed to the call termination rates contained in Attachment A to the MFS Agreement.[21] GNAPs wants to opt in to the MFS Agreement, including the rates it contains. BA, however, contends that those rates have been superseded by the lower rates established in the *Generic Rate Order*. Tr. 155-57, 183.

BA is wrong. The *Generic Rate Order* did not purport to supersede any rates that had been voluntarily negotiated by the parties and that had not been identified by the parties as "interim." The call termination rates in the MFS Agreement were fully and finally negotiated between BA and MFS, so by its terms the *Generic Rate Order* is inapplicable. Moreover, the key purpose of this aspect of the *Generic Rate Order* was to ensure that arbitrators facing the complex task of applying the cost standards of Section 252(d) of the federal law would not reach inconsistent results in different cases. Furthermore, the Act has a clear preference for negotiated agreements, indicated by the quite different and more lenient standard applicable to approval of negotiated as opposed to arbitrated issues. As a result, it would contravene federal law for the Board to supersede voluntarily negotiated rates — which are not required to meet the cost standard of Section 252(d) — with rates that have been established specifically to meet that cost standard. Each of these points is explained more fully below.

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[20] This would result in three changes: (1) the "Effective Date" would change from July 16, 1996, to November 1, 1998; (2) the date by which the jointly developed "grooming plan" in Section 10.1 would be completed would change from December 1, 1996 to March 15, 1999; (3) the termination date in Section 22.1 would change from July 1, 1999 to October 15, 2001.

[21] *See* GNAPs Exhibit 1 at 4 (noting a limited number of issues for arbitration, not including the call termination rates).

a. The 1996 Act Prefers Negotiated To Arbitrated Agreements.

One of the significant changes wrought by the Telecommunications Act of 1996 (the "1996 Act") is a move away from relying on cost-based regulation to solve the problems of the telecommunications industry. To the contrary, a key purpose of the law was to establish a "deregulatory" framework for the industry.[22] And a key step towards accomplishing that purpose was to permit parties to enter into negotiated interconnection agreements "without regard to" the standards established in Section 251, which apply only if negotiations fail and the matter goes to arbitration.[23]

The preference for negotiated agreements is reflected in the very different standards that state regulators such as the Board are to apply to agreements reached by negotiation, on the one hand, as opposed to agreements that result from arbitration, on the other hand. An agreement reached by arbitration may be rejected if "the agreement does not meet the requirements of sections 251 ... or the standards set forth in subsection (d) of this section." *See* 47 U.S.C. § 252(e)(2)(B). *See also* 47 U.S.C. § 252(d) (referred to in Section 252(e)(2)(B), and which contains rules for setting prices in arbitrated agreements). By contrast, as noted above, a negotiated agreement may only be rejected if it is discriminatory or if it is inconsistent with "the public interest, convenience, and necessity." *See* 47 U.S.C. § 252(e)(2)(A).

In its review of the efforts of the Federal Communications Commission to implement the terms of Sections 251 and 252, the Court of Appeals for the Eighth Circuit emphasized the law's preference for negotiated interconnection agreements. That

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[22] The basic purpose of the Telecommunications Act of 1996 was to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Joint Manager's Statement, S. Conf. Rep. 104-230, 104th Cong., 2d Sess. 1 (1996).

[23] *See* 47 U.S.C. § 252(a)(1): "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."

court held that "the Act's design [is] to make privately negotiated agreements the ***preferred route*** to local telephone competition" and that, indeed, the Act is designed to "encourage" such negotiated agreements.[24] The court explained:

> The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements. Voluntary negotiation is the first method listed under section 252, and the Act indicates that the parties may begin negotiations as soon as an entrant submits a request to an incumbent LEC. 47 U.S.C.A. § 252(a)(1). Meanwhile, the parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. Id. § 252(b)(1). These provisions reveal that the Act ***establishes a preference*** for incumbent LECs and requesting carriers to reach agreements independently and that the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations.

120 F.3d at 801 (emphasis added).

As described below, the *Generic Rate Order* was focused on establishing consistency in results in cases where rates were arbitrated and, therefore, subject to the terms of Section 252(d) of the Act. It has no application whatsoever to the rates contained in ***negotiated*** agreements such as the MFS Agreement — which is the "preferred" manner of establishing interconnection arrangements.

b. The *Generic Rate Order* Addresses Arbitrated Rates, Not Negotiated Rates.

It is totally clear that the *Generic Rate Order* was concerned with arbitrated rates established through the application of the pricing standards of Section 252(d) and

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[24] *Iowa Util. Bd. v. FCC,* 120 F.3d 753, 792, 800 (8th Cir. 1997), *cert. granted* 118 S. Ct. 879 (1998) (emphasis added).

Section 252(e)(2)(B), and not with negotiated rates approved under Section 252(e)(2)(A). *See Generic Rate Order* at 9-10 (noting that the question at hand was the meaning and application of Section 252(d)(1) of the Act). It follows that the generic rates established in that order have no bearing on the outcome of the case at hand.

At the outset, the relevant section of the order (Section VI) is entitled "WHY GENERIC RATES SHOULD SUPERSEDE ***ARBITRATED*** RATES." *Generic Rate Order* at 221 (emphasis added). It would make no sense to assume that when the Board said it wanted the generic rates to supersede "arbitrated rates," it really meant to say "arbitrated ***and negotiated*** rates."

The Board's detailed discussion of this matter also shows that the Board did not intend to displace rates established through negotiations (which is, after all, the "preferred" way to establish rates). First, the Board notes that "numerous approved or pending interconnection agreements" specifically noted that the rates in those agreements were "interim ... pending this decision," and states that the order "addresses all interconnection agreements that were interim in nature." *Generic Rate Order* at 221. The Board specifically addressed the question of which rates in the MFS Agreement were viewed as "interim" rates. Specifically, the Board found that:

> The revised [MFS] agreement approved by the Board provided rates for non-recurring and recurring unbundled local loop elements which would apply on an interim basis until such time as the Board set permanent rates. *See* Exhibit A to the BA-NJ/MFS Interconnection Agreement, revised as of October 21, 1996, ¶4.a.

Generic Rate Order at 230-31. And, indeed Section 4.a. of Exhibit A of the MFS Agreement (under "BA Service") indicates that the rates for these two items are "interim." But the terminating compensation rates to be paid to — and by — BA are